

Case Summary

Carlos Santiago appeals his conviction for Class D felony theft. We affirm.

Issues

Santiago raises three issues, which we reorder and restate as:

- I. whether the trial court properly admitted a transcript of a police interview into evidence;
- II. whether the jury was properly instructed; and
- III. whether there is sufficient evidence to support his theft conviction.

Facts¹

Sometime during Memorial Day weekend 2007, specifically between May 27, 2007, and May 29, 2007, the Rensselaer Electric Department (“Electric Department”) was broken into, and tools, wire, and a vehicle were stolen. Shortly thereafter, on June 7, 2007, a neighbor saw three men breaking into the Schumacher factory, an abandoned building located directly across the street from the Electric Department. The neighbor reported the activity to the police, who arrived on the scene and apprehended Santiago, Milton Cordero, and Benjamin Hernandez. Tools found on the scene matched the description of some of the missing tools from the Electric Department. Both Cordero and Hernandez told police that Santiago provided the tools and that Santiago indicated to them the tools came from across the street. Police searched the house Santiago shared

¹ We remind appellate counsel that pursuant to Indiana Appellate Rule 46(A)(6)(c), the facts shall be in narrative form and not a witness by witness summary of the testimony.

with his girlfriend and found tools in stacked milk crates. Some of these tools were later identified as those stolen from the Electric Department.

On June 20, 2007, the State charged Santiago with Class C felony burglary, Class D felony theft, and Class D felony auto theft; all of these charges involved the break-in at the Electric Department. On August 28, 2007, a jury trial began. After the State presented its evidence, the trial court granted Santiago's motion for judgment on the evidence regarding the auto theft charge. The jury found Santiago not guilty of the burglary charge and guilty of the theft charge. Santiago now appeals his theft conviction.

Analysis

I. Admission of Transcript

Santiago argues that the trial court improperly admitted into evidence a transcript of a police interview with Cordero. He claims the State only provided him with an audio copy of the interview, not the transcript, as part of its discovery. He also argues that the transcript is duplicative, prejudicial, and unredacted.

A trial court's ruling on the admission of evidence is subject to appellate review for abuse of discretion. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005). Even if we were to assume that the trial court abused its discretion by admitting both the audio recording and the transcript of the interview, we find any error to be harmless. Cordero's police interview was focused on the Schumacher break-in. To the extent that the interview included evidence of the Electric Department break-in, it was cumulative of Cordero's trial testimony. In the interview, Cordero stated that Santiago pointed to the building from where he took the tools. Cordero identified the building as being across

the street from the Schumacher factory. At trial, Cordero testified that once they were in the Schumacher factory, Santiago pointed across the street indicating that that was where he got the tools. The transcript of Cordero's police interview is cumulative of his trial testimony and its admission was not prejudicial to Santiago. See Kibsch v. State, 866 N.E.2d 726, 735 (Ind. 2007) (quoting Pavey v. State, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002) ("An error in the admission of evidence is not prejudicial if the evidence is merely cumulative of other evidence in the record."), trans. denied), cert. pending. Any error in the admission of the transcript of Cordero's interview was harmless.

II. Alibi Instruction

Santiago also argues that the trial court improperly refused to give the jury his tendered alibi instruction. A trial court has broad discretion in the manner of instructing the jury, and we review its decision for an abuse of that discretion. Snell v. State, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007). "We review the refusal of a tendered instruction by examining whether the tendered instruction correctly states the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the tendered instruction is covered by other given instructions." Id. at 395-96. Before a defendant is entitled to a reversal, he or she must affirmatively show that the erroneous instruction prejudiced his or her substantial rights. Id. at 396.

Here, Santiago has made no such showing. First, in violation of Indiana Appellate Rules 46(A)(8)(e) and 50(B)(1)(c), Santiago did not include a copy his alibi instruction in his brief or his appendix, nor does it appear that the tendered instruction can be found in the transcript. This omission is not just a technical error; without it there is no way for us

to determine whether the tendered instruction was a correct statement of the law. This determination is essential in this case, where the trial court refused to give the tendered instruction because it was no longer included in the pattern jury instructions. See Tr. pp. 471-474. Further, Santiago provides us with no analysis of the law of alibi defenses to suggest that the trial court improperly interpreted the recommendation in the pattern jury instructions.

Simply because Santiago offered alibi evidence and filed a notice of alibi does not mean that he was entitled to have his proffered instruction given to the jury or that the trial court was required to provide an alternate instruction. Without more, Santiago has not shown that the trial court abused its discretion in refusing to give the tendered instruction or that the refusal prejudiced his substantial rights.

III. Sufficiency of the Evidence

Santiago also argues that there is insufficient evidence to support his theft conviction. In reviewing a challenge to the sufficiency of the evidence we may not reweigh the evidence or judge the credibility of the witnesses. McHenry, 820 N.E.2d at 126. We must respect the jury's exclusive province to weigh conflicting evidence. Id. We may consider only the probative evidence and reasonable inferences supporting the verdict and must affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value

or use, commits Class D felony theft. Ind. Code § 35-43-4-2(a). The evidence showed that sometime during the 2007 Memorial Day weekend, the telephone wire to the Electric Department was cut, the exterior door was broken, numerous tools, wire, and a truck were removed from the building, a hole was cut into the surrounding fence, and a dolly was found outside. Some of the tools used in the break-in of the Schumacher factory matched a description of those missing from the Electric Department. Further, Cordero and Hernandez both testified that Santiago indicated that the tools he provided came from across the street—where the Electric Department was located. The foreman for the Rensselaer “line department” testified that he did not give anyone permission to take the missing items and that the serial number of one of the items recovered from Santiago’s house matched the serial number of a tool reported missing from the Electric Department. Tr. p. 275. The foreman also testified that the items recovered from Santiago’s house were the kinds of items reported missing.

From this evidence, the jury could have inferred that Santiago knowingly or intentionally exerted unauthorized control over the property of another with the intent to deprive the Electric Company of its value. We must reject Santiago’s request for us to reweigh the evidence. There was sufficient evidence to establish that Santiago committed theft.

Conclusion

Any error in the admission of the transcript of Cordero’s police interview is harmless. Santiago has not established that the trial court abused its discretion in refusing

to give his alibi instruction or that the refusal to do so prejudiced his substantial rights.

Finally, there is sufficient evidence to support the theft conviction. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.